

The ‘Nuremberg Clause’ and Beyond: Legality Principle and Sources of International Criminal Law in the European Court’s Jurisprudence

Triestino Mariniello*

Lecturer in Law, Department of Law and Criminology, Edge Hill University, UK

Abstract

Legislative acts or constitutional courts’ decisions allowing the prosecution of alleged perpetrators of international crimes committed in the past continue to attribute to the legality principle a central role within domestic criminal proceedings or complaints before the European Court of Human Rights. This article assesses the evolution of the recent jurisprudence of the Strasbourg Court, which in the 2008 *Korbely* and *Kononov* cases for the first time extended the standards of the legality principle over war crimes and crimes against humanity. It examines the rationale for this development, which constitutes an attempt by the Court to restore a proper balance between substantive justice and individual protection, by ascertaining whether domestic convictions were consistent with the qualitative elements of the legality principle, such as accessibility and foreseeability. Through a detailed analysis of the European jurisprudence, the article argues that, although the new approach of the Court entails *in abstracto* a strengthening of individual safeguards from the arbitrariness of state power, the meaningful protection of the legality principle may be *in concreto* significantly narrow. The reasons for such a result are two-pronged: first, the Court seems to provide an interpretation of past law which radically diverged from the interpretation of the law in place in the legal system at the material time of the events; second, the international sources accepted by the Court as a valid basis for the applicants’ convictions – pursuant to the standards of the legality principle – were intended to create obligations only upon states, rather than individuals.

Keywords

legality principle; European Court of Human Rights; war crimes; crimes against humanity; *Kononov*; *Korbely*

1. Introduction

On 9 April 2003, Estonian courts convicted Mr. Penart of crimes against humanity committed in 1953. A few months later, on 10 October 2003, Mr. Kolk and Mr. Kislyiy were found responsible for the same crimes that took place in 1949. All of them submitted complaints against Estonia before the European Court of Human

*) The author wishes to express his gratitude and appreciation to Professor Stefano Manacorda and Dr. Peter Langford for this comments on an earlier draft.

Rights (the Court), claiming that their convictions, following a law enacted on 9 November 1994, breached the prohibition of retrospective application of criminal law pursuant to Article 7 of the European Convention of Human Rights and Fundamental Freedoms (the Convention).¹

Likewise, on 27 August 2004, Mr. Kononov addressed the Court holding that his conviction for war crimes which occurred in 1944 was a violation of the *nullum crimen sine lege* principle.² The applicant had been convicted by Latvian courts on the basis of a definition of war crimes provided by a law issued on 6 April 1993.

On 20 January 2002, Mr. Korbely lodged an application to the Court against the Republic of Hungary alleging that he had been convicted of an action which did not constitute a crime at the time of commission.³ On 16 February 1993, the Hungarian Parliament passed a law (the Act) permitting the prosecution of those who had committed crimes during the 1956 uprisings.⁴ The conformity of the Act with the Constitution was confirmed, a few months later, by the Constitutional Court, with regard to crimes against humanity and war crimes.⁵ On 8 November 2001, Mr. Korbely was found responsible for crimes against humanity on the basis of Article 3(1) of the (IV) 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War.

These different cases place into question the *legality principle*, a cornerstone of every criminal justice system based on the rule of law, and a bulwark against the arbitrary exercise of *jus puniendi* by states or the international community.⁶ Indeed, an individual may be prosecuted, sentenced or convicted only if his act or omission and the form of punishment are defined by law, as enshrined in the Latin maxim *nullum crimen, nulla poena sine lege*. In pursuance of this principle, every individual has the right to know which acts are defined criminal, and predict with certainty the legal consequences deriving from their commission.⁷ Therefore, clear and specific criminal norms have a threefold purpose: providing legal

¹ See *Penart v. Estonia*, 24 January 2006, European Court of Human Rights (ECHR) no. 14685/04, <<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=penart&sessionid=98798553&skin=hudoc-en>>, last visited 15 April 2012; *Kolk and Kislyiy v. Estonia*, 17 January 2006, ECHR no. 23052/04 and no. 24018/04, <<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=kolk&sessionid=98798553&skin=hudoc-en>>, last visited 15 April 2012.

² See *Kononov v. Latvia* (*Kononov* no. 2), 17 May 2010, ECHR no. 36376/04, <<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Kononov&sessionid=98798553&skin=hudoc-en>>, last visited 19 March 2012.

³ See *Korbely v. Hungary*, 19 September 2008, ECHR no. 9174/02, <<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=korbely&sessionid=98798553&skin=hudoc-en>>, last visited 20 March 2012.

⁴ *Ibid.*, para. 16.

⁵ See Hungary, Constitutional Court, Decision no. 53/1993, On War Crimes and Crimes against Humanity, 13 October 1993.

⁶ See G. Fiandaca and E. Musco, *Diritto penale parte generale* (Zanichelli, 2009) p. 47 ff.

⁷ *Ibid.*

certainly, constraining states' power, and deterring individuals from engaging in socially undesirable conducts.⁸

This article aims to address one of the most debated issues in international criminal law concerning the uneasiness in balancing individual safeguards – protecting every person from arbitrary conviction and punishment – with the need to ensure substantive justice through the prosecution of acts regarded as abhorrent by all members of society, regardless of whether they were considered criminal at the time of commission. Although scholarship has already extensively addressed the problematic relationship between the legality principle and international crimes,⁹ the issue still remains particularly difficult at the national level. This ensures the topicality of the present article today.

It has been argued that, due to the increasing codification of international criminal law, the *nullum crimen* plea assumes less and less relevance before the International Criminal Court (ICC).¹⁰ Nonetheless, legislative acts or constitutional courts' decisions, allowing the prosecution of alleged perpetrators of international crimes committed in the past, continues to attribute the legality principle a central role within domestic criminal proceedings or complaints before the Court of Strasbourg. This is particularly true in relation to Eastern European countries, which, since the end of the Cold War, have showed a significant interest in prosecuting and punishing alleged perpetrators of war crimes and crimes against humanity taking place under the regime in the Soviet Union.

For instance, it may be noted that Article 5(4) of the Latvian Criminal Code permits the retrospective application of crimes against humanity and war crimes.¹¹ Similarly, Article 5(4) of the Estonian Criminal Code removes such crimes from the scope of applicability of the *nullum crimen sine lege*, by establishing that

⁸ *Ibid.*

⁹ See *inter alia* G. Vassalli (ed.), *Formula Di Radbruch E Diritto Penale. Note Sulla Punizione Dei 'delitti di Stato' nella Germania PostNazista e nella Germania PostComunista* (Giuffrè, 2001); M. Caianiello and E. Fronza, 'Il principio di Legalità nello Statuto della Corte Penale Internazionale', in G. Carlizzi *et al.* (eds.), *La Corte penale internazionale. Problemi e prospettive* (Vivarium, Napoli, 2003); M. Shahabuddeen, 'Does the Principle of Legality Stand in the Way of Progressive Development of Law?' 2:4 *Journal of International Criminal Justice* (2004); T. Meron, 'Revival of Customary Humanitarian Law' 99:4 *American Journal of International Law* (2005) p. 817; M. Catenacci, *Legalità e tipicità del reato nello Statuto della Corte Penale Internazionale* (Giuffrè, 2003); V. D. Degan, 'On the Sources of International Criminal Law', 4:1 *Chinese Journal of International Law* (2005); W. N. Ferdinandusse, *Direct application of international criminal law in national courts* (T.M.C. Asser Press, The Hague, 2006) p. 221 *et seq.*; M. Delmas-Marty, E. Fronza and E. L. Abdelgawad, *Les sources du droit international pénal* (Société de législation comparée, Paris, 2005).

¹⁰ W. A. Schabas, 'Synergy or Fragmentation?: International Criminal Law and the European Convention on Human Rights', 9:3 *Journal of International Criminal Justice* (JICJ) (2011) p. 615.

¹¹ The law modifying the Criminal Code was adopted on 6 April 1996 and exempted from any statutory limitations pursuant to Article 45(1). See also Article 5(4) of the Latvian Criminal Code, providing that "[a] person, who has committed an offence against humanity, an offence against peace, a war crime or has participated in genocide, shall be punishable irrespective of the time when such offence was committed".

crimes against humanity and war crimes are punishable regardless of the time of commission of the offence.¹² Similarly, both the Albanian and Polish Constitutions provide an exception for international crimes in their formulation of the legality principle in national law.¹³

In other domestic systems, the constitutional court has itself upheld the retrospective application of criminal norms without breaching the *nullum crimen sine lege*. For instance, the Hungarian Constitutional Court, referring to Articles 15(2) and 7(2) of the Convention, held that criminal legislation incorporating legal norms on war crimes and crimes against humanity could be retroactively applied.¹⁴ In the same manner, in Slovenia, the Constitutional Court affirmed that the prohibition of retroactive effects of penal law does not apply for acts or omissions which at the time they were committed were considered criminal offences in accordance with the general legal principles recognised by all nations.¹⁵

Despite these domestic attempts to provide victims of the most serious crimes with justice, concerns stem from the possibility that individuals are tried and convicted for acts which did not constitute criminal offences at the time of their commission. In this regard, a proper adherence to the standards of the legality principle requires the determination of whether the relevant act or omission would have given rise to criminal responsibility at the time of commission, and whether these individuals could effectively know that their acts were criminalised, and therefore could predict the criminal consequences.

This article aims, therefore, to further the discussion by analysing the European Court's approach to the relationship between the legality principle and international crimes. Both paragraphs of Article 7 refer to international law: according to the first paragraph: "No one shall be guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or *international law* at the time when it was committed";¹⁶ the second paragraph reads as follows: "This article shall not prejudice the trial and punishment of any person or any act or omission which, at the time when it was committed, was

¹² See Article 5(4) of the Estonian Criminal Code, which states that "[o]ffences against humanity and war crimes shall be punishable regardless of the time of commission of the offence".

¹³ Article 29 of the Constitution of the Republic of Albania establishes that "[n]o one may be accused or declared guilty of a criminal offense that was not provided for by law at the time of its commission, with the exception of offenses, which at the time of their commission constituted war crimes or crimes against humanity according to international law"; according to Article 42(1) of the Constitution of the Republic of Poland, "[o]nly a person who has committed an act prohibited by a statute in force at the moment of commission thereof, and which is subject to a penalty, shall be held criminally responsible. This principle shall not prevent punishment of any act which, at the moment of its commission, constituted an offence within the meaning of international law."

¹⁴ See *supra* note 5.

¹⁵ See Slovenia, Constitutional Court, U-I-248/96, 30 September 1998 and Slovenia, Constitutional Court, U-I-6/93, 13 January 1994.

¹⁶ See Article 7(1) of the Convention, emphasis added.

criminal according to the *general principles of law* recognized by the civilized nations.”¹⁷

Beyond the difficulty in setting out an exhaustive definition of international crimes or, at least, the essential criteria characterising conducts that constitute international crimes,¹⁸ the concept of ‘international law’ under Article 7(1) raises several problematical issues. First, it is subject to debate whether a domestic court can try or punish a behaviour criminalised only by international norms, not transposed into domestic law, without breaching the principle of legality.

Second, neither the Convention nor the Court specifies which sources fall within the concept of international law pursuant to article 7(1). According to Bassiouni, this provision reflects Article 38 of the Statute of the International Court of Justice, which includes customary law, conventions, and general principles of law.¹⁹ Nonetheless, general principles of law are explicitly mentioned in the second paragraph of Article 7 of the European Convention, whose purpose and scope is the object of an open-ended debate among scholars. It is thus necessary to commence by examining the relationship between the two parts of the provision in question.

Then, the article critically assesses the Court’s jurisprudence, which, until 2008, has systematically applied Article 7(2) to war crimes, acts of treason and collaboration with the enemy, and crimes against humanity without clarifying the purpose and content of the provision in question. In this respect, it is herein argued that the vague concept of the general principles of law recognised by the civilised nations has a significant impact on the fundamental rights and freedoms of the individual.

In 2008, for the first time, the Court did not automatically apply the Article 7(2) derogation, and –departing from its previous case law – extended the applicability of the legality principle to war crimes and crimes against humanity.²⁰ This article examines the rationale for this development, which constitutes an attempt by the Court to restore a proper balance between substantive justice and individual protection, by ascertaining whether domestic convictions were consistent with the qualitative elements of the legality principle, such as accessibility and foreseeability. However, although the new approach of the Court aims to ensure the guarantees enshrined in the legality principle, there still remain perplexities concerning the compatibility with the standards of the legality principle of international

¹⁷ See article 7(2) of the Convention, emphasis added.

¹⁸ C. Damgaard (ed.), *Individual criminal responsibility for core international crimes: selected pertinent issues* (Springer, 2008).

¹⁹ See M. C. Bassiouni (ed.), *Le fonti e il contenuto del diritto penale internazionale. Un Quadro teorico*. (Milano, 1999) pp. 755.

²⁰ See respectively *Kononov v. Latvia* (Kononov no. 1) 24 July 2008, ECHR no. 36376/04 <<http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbk&action=html&highlight=kononov&sessionId=98798553&skin=hudoc-en>>, last visited 10 February 2012; *Korbely*, *supra* note 3.

sources not entailing any reference to criminal liability or criminal sanction but rather imposing obligations only upon states.

2. A Preliminary Issue: The Purpose of the ‘General Principles of Law’ in the Convention System of Protection

It is particularly difficult to argue that crimes against humanity and crimes against peace were already punishable under international law at the time at which the International Military Tribunal of Nuremberg (IMT) was established.²¹ Although the defence counsels claimed that the prosecution for crimes against peace violated the legality principle, the judges rejected such arguments, holding that:

It is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished... [The Nazi leaders] must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression.²²

As a mere principle of justice, rather than a binding rule, the judges could decide whether it would have been more just to leave acts committed by Nazi forces unpunished or punish them by relying on a retroactive application of criminal law.²³ In balancing the legality principle with the need to prosecute perpetrators of heinous actions, the judges convicted Nazis also of conduct not proscribed and criminalised under national or international law at the time at which they were performed.²⁴ In this way, the legality principle was intended to yield to superior reasons of justice intended to prevent Nazi perpetrators from being unpunished.²⁵

In this context, in order to avoid affording Nazi criminals a claim of a violation of the *nullum crimen sine lege* before the Strasbourg Court, a second paragraph was inserted in Article 7 of the Convention (the so-called ‘Nuremberg clause’),

²¹ See Schabas *supra* note 10, p. 614.

²² *France et al. v. Goring et al.* (1948) 22 Trial of the Major War Criminals before the International Military Tribunal, 14 November 1945–1 October 1946 (IMT) 203, p. 462.

²³ G. Acquaviva, ‘At the Origins of Crimes against Humanity: Clues to a Proper Understanding of the “Nullum Crimen” Principle in the Nuremberg Judgment’, 9:4 *JICJ* (2011) p. 890.

²⁴ H. Kelsen, ‘Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?’, 1:1 *International Law Quarterly* (1947) p. 108.

²⁵ A. Cassese (ed.), *International Criminal Law* (Oxford, 2003) p. 72; M. C. Bassiouni (ed.), *Crimes Against Humanity in International Criminal Law*, 2nd edition (1999) p. 169.

following a proposal of the Luxembourg delegate.²⁶ The literature is rife with examples of studies confirming that such provision, as an exception to Article 7(1), has as its goal removing very serious acts from the scope of applicability of the *nullum crimen sine lege* principle.²⁷ In other words, the Convention system of protection allows domestic authorities to punish retrospectively individuals who have committed acts which although not criminalised by any law are unacceptable under the general principles of law recognised by civilised countries.²⁸

By contrast, it has been concluded elsewhere that paragraphs 1 and 2 of Article 7 set out a single unified rule, in which the Nuremberg clause is complementary to the non-retroactivity principle.²⁹ It follows that whereas the concept of international law established in the first paragraph entails treaty or customary law, Article 7(2) refers to the “general principles of law recognized by the whole international community”.³⁰ In other words, the purpose of Article 7(2) is to extend the number of sources, by ensuring that an act which is not criminalised under either treaty or customary law may be still punishable pursuant to these general principles of law.

This interpretative approach does not seem extremely persuasive. If the purpose of both paragraphs is the same, it is difficult to understand why general principles of law should not fall within the meaning of international law pursuant to Article 7(1). This interpretation entails, thus, the risk of depriving Article 7(2) of a meaningful content, considering that the first paragraph explicitly mentions ‘international law’, which includes also the general principles of law pursuant to Article 38(1)(c) of the Statute of the International Court of Justice (ICJ).³¹

An inclination for the derogatory nature of the Nuremberg clause stems both explicitly and implicitly from the Court’s jurisprudence. Indeed, in the *Kononov* case, the European judges held that Article 7(2) “constitutes an exceptional derogation from the general principle laid down in the first”.³² In addition, as the next

²⁶ J. Pradel and G. Cortens, *Droit pénal européen* (Dalloz, Paris, 1999) p. 321.

²⁷ D. Gomien, D. Harris and L. Zwaak (eds.), *Law and practice of the European Convention on Human Rights and the European Social Charter* (Council of Europe Publishing, Strasbourg, 1996) p. 206; *ibid.*, p. 321; P. Rolland, ‘Article 7’, in L. E. Pettiti, E. Decaux and P.-H. Imbert (eds.), *La Convention Européenne des Droits de l’Homme (comments article by article)* (Economica, Paris, 1995) p. 299; P. Van Dijk and G. J. H. Van Hoof (eds.), *Theory and Practice Theory and Practice of European Convention on Human Rights* (The Hague, 1990) p. 486; J. Velu and R. Ergec (eds.), *La Convention Européenne des droits de l’homme*, (Bruylant, Bruxelles, 1990) p. 517.

²⁸ F. Francioni, ‘Crimini internazionali’, in *Digesto - Discipline pubblicistiche*, IV (UTET, Torino, 1989).

²⁹ A. Cassese, ‘Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law: the Kolk and Kislyiy v. Estonia Case before the ECHR’, 4:2 *JICJ* (2006) p. 415.

³⁰ *Ibid.*

³¹ P. De Sena, *Convenzione europea dei diritti dell’uomo e repressione di crimini contro l’umanità: in margine al caso Touvier* 81 *Rivista di Diritto Internazionale* (1998) p. 414.

³² See *Tess v. Lettonie*, 12 December 2002, ECHR no. 34854/02, p. 7, <<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=tess&sessionid=98806214&skin=hudoc-en>>, last visited 19 April 2012; *Kononov no. 1*, *supra* note 20, para. 115.

section will show, when the Court applies the provision in question, it does not hold it necessary to ascertain whether the domestic interpretation of criminal law is consistent with the standards of the legality principle.

The characterisation of paragraph 7(2) as an exception is also corroborated by the fact that Germany raised concerns related to its incompatibility with the legality principle enshrined in its Constitution. Indeed, German authorities ratified the Convention with a reservation to Article 7(2), holding that the clause in question could have been applied only if compatible with Article 103(2) of the Constitution, which allows the punishment of an act only if the sanction has been defined by a *praevia* law. In this regard, also the Preparatory Works to the Convention indicate that the second paragraph was added to prevent Article 7(1) from affecting those laws adopted at the end of Second World War (WWII), by Contracting Parties, to prosecute war criminals.³³

Therefore, Article 7(2) constitutes a strong reaction to the degeneration of national justice systems in which acts considered as the most serious crimes under international law are not proscribed,³⁴ and in some cases – such as the Nazi Germany – are even supported by state authorities. It follows that the Nuremberg clause allows deviations from the standards of the legality principle in relation to those domestic justice systems in evident contrast to the moral values underlying the *jus gentium*.³⁵

In this regard, Article 7(2) mirrors the weak status of the legality principle immediately after the end of WWII, when it was not recognised yet as an international law-based human right. Moreover, at the time of Nuremberg, the retroactive application of criminal law in relation to acts considered immoral by the community of nations was generally acknowledged.³⁶ The porous nature of the legality principle open to exceptions and derogations was also confirmed by Kelsen:

Since the internationally illegal acts for which the London Agreement established individual criminal responsibility were certainly also morally most objectionable, and the persons who committed these acts were certainly aware of their immoral character, the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice. Justice required the punishment of these men, in spite of the fact that under positive law they were not punishable at the time they performed the acts made punishable with retroactive force. In case two postulates of justice are in conflict with each other, the higher one prevails; and to punish those who were morally responsible for the international crime of the Second World War may certainly be considered as more important than to comply with the rather relative rule against *ex post facto* laws, open to so many exceptions.³⁷

³³) See the *Report of the Committee of Experts*, CM/WP I (50) 15 (16/03/1950): TP iii, 485.

³⁴) A. Bernardi, 'Nessuna pena senza legge (Art. 7 CEDU)', in S. Bartole, B. Conforti and G. Raimondi (eds.), *Commentario alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali* (Cedam Padova, 2001) p. 298.

³⁵) H. Kelsen, 'Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals', 31:5 *California law review* (1943) p. 544.

³⁶) See Cassese, *supra* note 25, p. 72; Bassiouni, *supra* note 25, p. 108.

³⁷) Kelsen, *supra* note 24, p. 165.

Hence, in the aftermath of WWII, Article 7(2) provided the possibility to excuse the retroactive criminal liability for acts considered so abhorrent by the community of nations that it would contravene a higher notion of justice not to punish those responsible for such atrocities.

3. The 'Nuremberg Clause' in Strasbourg Jurisprudence: A General Overview

The Court has confronted few cases in its jurisprudence regarding the alleged violation of the legality principle claimed by applicants convicted of international crimes. Until 2008, both the Commission and the Court have systematically applied the Nuremberg clause to war crimes, treason and collaboration with the enemy, and crimes against humanity.³⁸ In this regard, all applications were declared inadmissible, since the crimes in question were punishable pursuant to the general principles of law recognised by the civilised nations.

All these cases share similar apodictical reasoning: the Commission and the Court noted that the applicants had not been convicted of ordinary crimes, but of international crimes falling within the scope of article 7(2).³⁹ In explaining why these crimes were covered by the Nuremberg clause, the European Court relied on the Preparatory Works, providing that

the purpose of paragraph 2 of article 7 is to specify that this Article does not affect laws which, in the wholly exceptional circumstances at the end of the Second World War, were passed in order to punish war crimes, treason and collaboration with the enemy and does not in any way aim to pass legal or moral judgment on those laws.⁴⁰

In the famous *Touvier* case, for the first time, the Court pointed out that this reasoning is also applicable to crimes against humanity.⁴¹ In particular, the applicant who had served as the intelligence chief of a pro-Nazi militia active in France during the final year of the Nazi occupation had been convicted by a French court of aiding and abetting Nazi forces in committing crimes against humanity in 1995. The Court rejected the complaint as manifestly ill-founded, by holding that such

³⁸) With regard to war crimes, see *B. v. Belgium*, 10 July 1957, European Commission of Human Rights (Commission); *X. v. Norway*, 30 May 1961, Commission. In relation to crimes against humanity, see *Touvier v. France*, 13 January 1997, Commission no. 29420/95, <<http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbk&action=html&highlight=touvier&sessionid=98806214&skin=hudoc-en>>, last visited 10 May 2012; *Papon v. France* (no. 2), 15 November 2001, ECHR no. 54210/00, <<http://cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbk&action=html&highlight=papon&sessionid=98811241&skin=hudoc-en>>, last visited 30 May 2012; *Kolk and Kislyiy*, *supra* note 1; *Penart*, *supra* note 1. Finally, with respect to acts of treason and collaboration with the enemy, see *De Becker v. Belgium*, 27 March 1962, Commission no. 214/56.

³⁹) *Ibid.*

⁴⁰) See *inter alia* *Touvier*, *supra* note 38, p. 14.

⁴¹) *Ibid.*

crimes fell within the scope of applicability of Article 7(2).⁴² In so doing, the Court referred to the Preparatory Works, although the text only explicitly mentions war crimes and treason and collaboration with the enemy.

With regard to the scope of Article 7(2), a minority doctrine, on the basis of the Preparatory Works, endorse a narrow interpretation, by confining the applicability of this provision to crimes committed during WWII only.⁴³ By contrast, it has been argued that such an interpretation fails to consider the Preparatory Works as the supplementary means of interpretation applicable only when the meaning of a treaty is ambiguous or obscure, in line with Article 32 of the Vienna Convention on the Law of Treaties.⁴⁴ Since no limitation *ratione temporis* or *ratione personae* is made in Article 7(2), the view that general principles might be applied also to events and individuals not related to WWII is widely supported.⁴⁵

In conformity with the latter approach, the Court applied Article 7(2) even to acts not linked to the atrocities committed by Nazi forces, finding that “the responsibility for crimes against humanity cannot be limited only to the nationals of certain countries and solely to acts committed within the specific time frame of the Second World War”.⁴⁶ This is true, for instance, in relation to the two cases against Estonia.⁴⁷ In 2003, Mr. Penart had been convicted of crimes against humanity committed in 1953, when he served as the head of Elva Department of the Ministry of the Interior of the Estonian Soviet Socialist Republic, for having organised the killing of three civilians under the aegis of the fight against banditry.

Similarly, in 2004 Mr. Kolk and Mr. Kislyiy had been convicted of the same crimes, having participated in the deportation of members of the civilian population from Estonia to remote areas of the USSR in March 1949. All the applicants had been convicted by Estonian courts on the basis of Articles 61(1) and 5(4) of the Penal Code, which entered into force respectively on 9 November 1994 and on 1 September 2002.⁴⁸ According to the Court, these crimes are universally punishable on the basis of the London Charter and the Resolution No. 95 of the General Assembly of the United Nations Organization (11 December 1946) and later by the International Law Commission.⁴⁹ In addition, the Court held that such crimes are not subject to statutory limitations and therefore are punishable irrespective of the date of their commission, and whether committed in time of war or in time of peace.⁵⁰

⁴² *Ibid.*

⁴³ See Velu and Ergeç *supra* note 27, p. 517.

⁴⁴ Rolland, *supra* note 27, p. 300.

⁴⁵ See *inter alia* Van Dijk and Van Hoof, *supra* note 27, p. 487.

⁴⁶ See Penart, *supra* note 1, p. 9.

⁴⁷ *Ibid.*; Kolk and Kislyiy, *supra* note 1; see also *Naletilic v. Croatia*, 4 May 2000, ECHR no. 51891/99, <<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=naletilic&sessionid=98811241&skin=hudoc-en>>, last visited 5 June 2012.

⁴⁸ See Penart, *supra* note 1, p. 4; Kolk and Kislyiy, *supra* note 1, p. 4.

⁴⁹ *Ibid.*, p. 9.

⁵⁰ *Ibid.*, p. 10.

With regard to the applicants' submissions, challenging the correct qualification of the crimes provided by domestic authorities, the Court pointed out that the interpretation of criminal law still belongs to domestic courts⁵¹ and "it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention".⁵² Indeed, the applicants had contested both the status of civilians attributed to the victims and the *nexus* of their conducts with an armed conflict, as required by Article 6(c) of the London Charter. However, the Court, on the basis of its limited role, denied that it fell within her competence to critically assess the classification of the applicants' conducts as international crimes.

4. The Twilight of Legal Certainty: Assessing the Impact of the 'Nuremberg Clause' on Individual Guarantees

In all cases concerning the application of Article 7(2), the Strasbourg Court has not deemed it opportune to clarify the link between the two paragraphs of Article 7, and to shed light on the uncertain relationship between the legality principle and international crimes in the Convention system. Similarly, the Court declined to provide any elucidation of the notion of general principles of law, despite the necessity of such a clarification, considering the vagueness of such a concept. As held by Degan,

no other source of international law raises so many doctrinal controversies as the general principles of law 'recognized by civilized nations' ... Writers disagree on the substance and content of general principles of law, as well as on their legal scope and relationship with other main sources, namely treaties and customary law.⁵³

Brownlie pointed to the unsuitability of a rigid categorisation of the general principles of law, defined as "primarily abstractions from a mass of rules and have been so long and so generally accepted as to be no longer directly connected with state practice".⁵⁴ According to some scholars, general principles of law constitute an affirmation of natural law concepts, which are deemed to underpin the system of international law.⁵⁵ By contrast, some argue that these sources are part of treaty and customary law, as they do not add anything new to international law.⁵⁶ In this regard, the 'general principles of law' are interpreted as a reiteration of the

⁵¹ *Ibid.*, p. 9.

⁵² See *Touvier*, *supra* note 38, p. 15.

⁵³ V. D. Degan, *Sources of International Law* (Martinus Nijhoff, 1997) p. 14.

⁵⁴ I. Brownlie, *Principles of Public International Law*, 5th edition (Clarendon Press, Oxford, 1998), p. 18.

⁵⁵ See *inter alia* H. Waldock, *General Course on Principles of Public International Law* (Hague Academy of International Law, 1962), p. 54.

⁵⁶ G. I. Tunkin, *Theory of International Law* (Harvard University Press, 1972) ch. 7.

fundamental precepts of international law which have already been enshrined in treaty and customary law.⁵⁷

Article 7(2) raises further interpretative problems, since the specific content of general principles, lying at the intersection of natural law and positive law,⁵⁸ continues to remain uncertain in international law. According to Lombois, for example, the general principles of law under Article 7(2) reflect a sort of *morale internationale*,⁵⁹ which can be applied to fill the gaps of normative lacunae both in national and international law. Deciphering the contours and the substance of the general principles of law would be beyond the frontiers of a article whose aim is to assess, from a criminal law standpoint, the impact of the derogation to the legality principle on individual guarantees. However, it is here worth noting the difficulty in establishing with accuracy the meaning of Article 7(2), and therefore in drawing a clear borderline between the two paragraphs of Article 7, in order to define both the scope of applicability of the legality principle and its exception.

According to the reasoning provided by the European judges, war crimes, crimes against humanity, and treason and collaboration with the enemy fall within the scope of Article 7(2).⁶⁰ In reaching this conclusion it does not assume any relevance whether at the material time the applicants' conduct constituted the crimes in question or the same claimants could foresee the criminal consequences of their acts.

With regard to the objective elements of the crimes, the European judges accepted the formal qualification offered by domestic courts of the applicants' conduct as international crimes. For instance, in *Touvier*, the Court did not consider it necessary to find whether the offence with which the applicant had been charged could at the time it was committed be classified as a crime against humanity.⁶¹ In the Estonian cases, the Court, relying on the formal classification of crimes provided by domestic authorities, merely noted that the acts committed by the applicants were included among those forms of conduct constituting crimes against humanity pursuant to Article 6(c) of the London Charter.⁶² This definition, beyond the specific conduct, also provides that the act is committed against civilians and in time of war (*war nexus*).⁶³ The contextual element of the *war nexus* is fundamental, pursuant to the London Charter, to distinguish between crimes against

⁵⁷) *Ibid.*

⁵⁸) Bernardi, *supra* note 34, p. 298.

⁵⁹) C. Lombois, *Droit pénal international* (Daloz, 1979) pp. 130–131.

⁶⁰) See all the cases mentioned *supra* note 38.

⁶¹) See *Touvier*, *supra* note 38, p. 14.

⁶²) See *Penart*, *supra* note 1, p. 9; *Kolk and Kislyjy*, *supra* note 1, p. 9.

⁶³) See Article 6(c) of the London Charter: "Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated" (emphasis added).

humanity and ordinary crimes.⁶⁴ Indeed, it is only when conduct takes place in connection with war crimes or crimes against peace, pursuant to Article 6(c), that it constitutes an offence against the values supporting the establishment of the Nuremberg IMT.⁶⁵

In addition, these cases show that pursuant to Article 7(2) it was irrelevant to ascertain whether or not the applicant knew that his act was criminalised. In other words, the standards of the *nullum crimen sine lege*, and the guarantees they seek to ensure, did not find any fulfilment when a domestic court convicted an individual of war crimes, treason and collaboration with the enemy, and crimes against humanity.

The requirements of the *nullum crimen sine lege*, developed and applied by the Court to ordinary crimes, provide, *inter alia*, that offences must be clearly formulated in order to protect individuals from arbitrary exercise of the state's *jus puniendi*.⁶⁶ Criminal law, as sufficiently accessible and foreseeable, allows a person to know which behaviour is criminal.⁶⁷ In the light of Article 7(2), however, these standards were not taken into account by the Court to assess the compatibility of domestic convictions with the safeguards of the legality principle as enshrined in Article 7(1). This means that the Court admitted the possibility that domestic convictions did not breach Article 7, even if the law proscribing the crimes in question was not accessible, and the applicants could not effectively foresee, at the material time, the criminal conviction they would potentially incur.

For instance, in the cases against Estonia, although the acts committed by the applicants could have been regarded as lawful under the Soviet law at the material time, and the definition of crimes against humanity was introduced in the domestic justice system 41 years after the events in question, the Court held that there was no violation of the non-retroactivity principle.⁶⁸ Indeed, the Court argued these crimes were contrary to the general principles of laws recognised by the civilised nations. In particular, referring to the events in the *Kolk and Kislyiy* case, Cassese pointed out that:

There surely did not exist a 'general principle of law recognized by civilized nations' prohibiting crimes against humanity ... in 1949 the proscription of crimes against humanity manifestly did not amount to a general principle of law, let alone to a rule laid down in the legislation of most countries of the world.⁶⁹

⁶⁴) See Cassese, *supra* note 29, p. 413.

⁶⁵) *Ibid.*

⁶⁶) See *inter alia* *S.W. v. United Kingdom*, 22 November 1995, ECHR no. 20166/92, <<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=s.w.&sessionid=98811241&skin=hudoc-en>>, last visited 11 April 2012, para. 34.

⁶⁷) *Ibid.*, para. 35.

⁶⁸) See *Penart*, *supra* note 1; *Kolk and Kislyiy*, *supra* note 1.

⁶⁹) Cassese, *supra* note 29, p. 415.

In the light of the foregoing, it can be argued that the application of Article 7(2) jeopardises individual guarantees, because of the lack of any determination of the compatibility of domestic convictions with the requirements of the legality principle. Moreover, considering the *non-derogatory* nature of the legality principle pursuant to Article 15(2) of the Convention,⁷⁰ the role of the Court and the Commission, confined to a mere ‘ratification’ of the formal classification of crimes provided by domestic authorities, appears even more objectionable.

The Court seems to renounce its role of guardian of the fundamental individual safeguards established by the Convention. While domestic courts are competent to provide interpretation of criminal law, it still falls within the Court’s sphere of responsibility to determine whether such an interpretation is consistent with the Convention. However, the approach followed by the Strasbourg jurisprudence in relation to international crimes entails the concrete risk that in balancing between substantive justice and individual liberties a system characterised by a ‘crisis of guarantees’ is established⁷¹ – a system in which, in other words, the knowledge of the individual that his conduct was criminal at the relevant time is not accorded any relevance.

5. The Extension of the Legality Principle over Crimes against Humanity and War Crimes: The *Korbely* and *Kononov* Cases

In the *Korbely* and *Kononov* cases, for the first time the Court applied the legality principle to crimes against humanity and war crimes, respectively.⁷² This marked a significant change from the earlier position taken by the Court. Indeed, in both cases, the Strasbourg judges assessed whether, at the time of their commission, there was in international law a *clear* legal basis which could be taken into account for the applicant’s conviction.⁷³ Such a paradigm shift entails that even in cases of international crimes Article 7 has to provide “effective safeguards against arbitrary prosecution, conviction and punishment”.⁷⁴ In order to achieve this purpose, the Court has made plain that the principle of legality is not confined to the non-retroactivity of criminal law (*lex previa*), but it also prohibits the analogical interpretation in *malam partem* of criminal law (*lex stricta*),⁷⁵ and requires that the offence is clearly defined in the law (*lex certa*).⁷⁶

⁷⁰ Article 15(2), indeed, provides that “[n]o derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision”.

⁷¹ This definition is provided by Caianiello and Fronza, *supra* note 9, p. 308.

⁷² See *Kononov no. 1*, *supra* note 20; *Korbely*, *supra* note 3.

⁷³ *Ibid.*, para. 116; *ibid.*, para. 70.

⁷⁴ *Ibid.*, para. 113; *ibid.*

⁷⁵ *Ibid.*, 114 (a); *ibid.*

⁷⁶ *Ibid.*, 114 (b); *ibid.*

The non-retroactivity principle, according to the Court, binds both legislatures and judicial decision-making.⁷⁷ Indeed, while the former may not enact criminal norms with retrospective effects, the latter may clarify the content of criminal norms and adapt them to changing circumstances.⁷⁸ However, criminal courts are prevented from “modifying the case law through an interpretation which renders the criminal law applicable to an act which previously had never been punishable”.⁷⁹

Thus, on the basis of Article 7(1), the Court ascertained whether the offences were defined by law with sufficient accessibility and foreseeability to enable the applicants to know at the time of the events which acts and omissions would have made them criminally liable for such crimes and regulated their conduct accordingly.⁸⁰ Pursuant to these requirements, an individual “must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case”,⁸¹ and must be able to reasonably foresee what the consequences of his acts or omissions will be.⁸²

On the one hand, foreseeability imposes upon the legislature the duty to define with reasonable precision the prohibited acts and the related sanctions. On the other hand, domestic courts must guarantee a reasonable interpretation of the law, consistent with the essence of the offence, without, for instance, applying the criminal norm analogically.⁸³

Hence, the European Court attempts to ensure judicial protection by assessing the material elements of criminal law, such as formulation and application, rather than whether sources are written or not. In this context, the protective role of the legality principle should be ensured through the assessment of the accessibility of relevant criminal law and the foreseeability of criminal sanctions. By providing further content to the non-retroactivity principle, such standards are developed by the Court to guarantee legal certainty, which could be affected by the existence of a pluralism of normative sources (either written or unwritten) contributing to the definition of prohibited acts.⁸⁴

Following this reasoning, in *Korbely* the Grand Chamber found that the claimant’s conviction amounted to a violation of Article 7 since he could not

⁷⁷ Bernardi, *supra* note 34, pp. 261–267.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ See *Korbely*, *supra* note 3, para. 70; *Kononov no. 1*, *supra* note 20, para. 114(b).

⁸¹ See *Sunday Times v. United Kingdom*, 26 April 1979, ECHR no. 6538/74, para. 49, <<http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbk&action=html&highlight=sunday%20%27C%20times&sessionId=98821363&skin=hudoc-en>>, last visited 23 February 2012.

⁸² *Ibid.*

⁸³ See *Kononov no. 1*, *supra* note 20, para. 114(a).

⁸⁴ *Ibid.*

predict that his act constituted crimes against humanity at the time of their commission.⁸⁵

The domestic proceedings concerned the applicant's conduct that took place during the Hungarian revolution of 1956, when under martial law as a military officer he ordered his soldiers to shoot armed rebels who had occupied the police station of Tata. It was only in 1993 that the Hungarian Parliament provided the possibility to try crimes committed in the past, issuing the Act, which, on the basis of the 1968 United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, established, *inter alia*, that certain acts committed during the 1956 uprising were not subject to statutory limitation.⁸⁶ The conformity of the Act with the Constitution was confirmed, a few months later, by the Constitutional Court with regard to crimes against humanity and war crimes.⁸⁷

Following the Constitutional Court's decision, Mr. Korbely was held responsible for crimes against humanity on the basis of Article 3(1) of the Fourth Geneva Convention of 1949. However, the European Court held that such a conviction breached the non-retroactivity principle, as the applicant's conduct did not amount to crimes against humanity. The Court's conclusion lies in the fact that the rebels, who did not show any intention to surrender, did not fall within any of the categories of non-combatants protected under common Article 3 to the Geneva Convention. Five judges sitting in the Grand Chamber dissented by pointing out that the majority's approach exceeded the Court's competence, as it substituted "their own findings of fact for those of the Hungarian judicial authorities", particularly in relation to the conducts of the armed rebels.⁸⁸ According to the dissenting opinion, the majority's conclusion was based on a reconstruction of the victims' actions differing from the facts presented by domestic courts, which were in a better position to assess all the available evidence.⁸⁹

With regard to the *Kononov* case, the Grand Chamber concluded that the applicant's conviction for war crimes, in 2004, pursuant to Article 68(3) of the Latvian Criminal Code, which entered into force in 1993, did not breach Article 7 of the Convention.⁹⁰ This provision, enacted 49 years after the events concerned, provides a definition of war crimes through a *renvoi* to 'relevant legal conventions' of international law.⁹¹

⁸⁵) See *Korbely*, *supra* note 3, para. 95.

⁸⁶) Proclaimed in Hungary by Law-Decree no. 1 of 1971.

⁸⁷) See *supra* note 5.

⁸⁸) See the attached Joint Dissenting Opinion of Judges Lorenzen, Tulkens, Zagrebelsky, Fura-Sandstrom and Popovic.

⁸⁹) *Ibid.*

⁹⁰) See *Kononov* no. 2, *supra* note 2, para. 244.

⁹¹) According to such provision, "[a]ny person found guilty of a war crime as defined in the relevant legal conventions, that is to say violations of the laws and customs of war through murder, torture, pillaging from the civil population in an occupied territory or from hostages or

Mr. Kononov, as member of the Soviet red partisans, had taken part in 1944 in a punitive military expedition in the village of Mazie Batie against some inhabitants, suspected of being collaborators of the Wehrmacht.⁹² The group of red partisans led by Mr. Kononov found German weapons and munitions in the houses of the suspects. In the course of the operation, nine people were killed, six men and three women.⁹³ The Court rejected that domestic authorities had violated Article 7 since at the time of the events war crimes for which the applicant was convicted were defined with sufficient accessibility and foreseeability predominantly by the Hague Convention of 1907.⁹⁴

6. Transcending the Nuremberg Clause? Synergy between Human Rights Law and International Criminal Justice

The extension of the legality principle to crimes against humanity and war crimes shows an evolution in the Court's jurisprudence, willing to restore a balance between individual guarantees and most serious crimes. If it is true that the Court did not clearly articulate the rationale for the departure from its previous case law, the determination of the existence – at the time of the events – of a clear legal basis for the applicants' convictions is now considered as an essential component of the fundamental rights of every person. In other words, the application of the requirements of the legality principle to international crimes constitutes an evolutionary approach, necessary to render Convention rights practical and effective.

Thus, the Court acknowledged that the guarantees enshrined in the legality principle prevail over the contingent reasons which, in 1950, justified the establishment of the Nuremberg clause, whose scope is explicitly limited in *Kononov*, to the exceptional circumstances, which occurred after the end of the WWII.⁹⁵ Such an interpretation seems to be more consistent with Article 15(2) of the Convention, which prohibits any derogation from the legality principle in time of war or public emergency.

Article 7(2) reflected the status of the *nullum crimen sine lege* in international law immediately after the end of the WWII, when, as postulated by the IMT, this

prisoners of war, the deportation of such people or their subjection to forced labour, or the unjustified destruction of towns and installations, shall be liable to life imprisonment or to imprisonment for between three and fifteen years."

⁹² See *Kononov no. 2*, *supra* note 2, para. 14.

⁹³ *Ibid.*, paras. 17–20.

⁹⁴ The European Court relies on the Hague Convention 1907 with regard to three specific conducts of the applicant, whereas, in relation to a further act, it uses the Lieber Code of 1863; see *Kononov no. 2*, *supra* note 2, paras. 216–219.

⁹⁵ See *Kononov no. 1*, *supra* note 20, para. 115(b).

principle was not deemed as a limitation of sovereignty.⁹⁶ In particular, the non-retroactivity of criminal law did not constitute an international law-based human right that could be asserted by an individual against domestic or international authorities.⁹⁷ At this period, the reference to natural laws was considered necessary to avoid the impunity of the major war criminals, due to the primitive state of positivisation of international criminal law.⁹⁸

Whilst immediately after the end of the WWII the legality principle was not recognised in international law, at present “the prohibition of retroactive penal measures is a fundamental principle of criminal justice, and a customary, even peremptory, norm of international law that must in all circumstances be observed by national and international tribunals”.⁹⁹ Thus, asserting that the legality principle does not apply as a rule of international law is no longer correct. In this respect, Gallant has stated that since Nuremberg the non-retroactivity principle has gained substantial acceptance in national constitutions, international treaties and other legal documents.¹⁰⁰

Therefore, if it could be argued that at the time of Nuremberg the use of analogy was seemingly not forbidden in international law¹⁰¹ since then the possibility for judges to create crimes by analogy has been prohibited by the Rome Statute (Statute) of the International Criminal Court (ICC),¹⁰² other current treaties¹⁰³ and customary international human rights law.¹⁰⁴

Thus, despite the difficulties encountered by the *nullum crimen sine lege* in international criminal law, because of the different standards and application in domestic criminal justice systems, this principle has gained significant relevance for the purpose of ensuring legal certainty even in relation to the most serious crimes concerning the international community as a whole. This is testified to by the experience of the *ad hoc* international criminal tribunals and particularly the Rome Statute.

⁹⁶) See IMT, *supra* note 22.

⁹⁷) See K. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press, 2009) p. 67.

⁹⁸) See Cassese, *supra* note 25; Bassiouni, *supra* note 25.

⁹⁹) T. Meron, *War Crimes Law Comes of Age* (Oxford University Press, 1998) p. 244.

¹⁰⁰) Gallant, *supra* note 97.

¹⁰¹) See Bassiouni, *supra* note 25.

¹⁰²) Article 22(2).

¹⁰³) The legality principle – as an essential component of fundamental rights of every person – is recognised by a large number of normative texts in the protection of human rights field, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Inter-American Convention for Human Rights and the European Convention for Human Rights and Fundamental Freedoms, the Convention on the Rights of the Child, Charter of Fundamental Rights of EU, Revised Arab Charter on Human Rights, African Charter of Human and People's Rights.

¹⁰⁴) Gallant, *supra* note 97, chapter VII.

It is indeed worth underlining that *ad hoc* tribunals had already found that in order to establish criminal responsibility it is not sufficient to merely state that the individual actions were illegal under international law.¹⁰⁵ The International Criminal Tribunal for the former Yugoslavia's (ICTY) Appeals Chamber (AC), for example, required that offences must be defined with:

Sufficient clarity under international law for its general nature, its criminal character and its approximate gravity to have been sufficiently foreseeable and accessible ... the requirement of sufficient clarity of the definition of a criminal offence is in fact part of the *nullum crimen sine lege* requirement, and it must be assessed in that context.¹⁰⁶

Therefore, it applied to crimes falling within the ICTY's Statute those qualitative standards of the legality principle, such as accessibility and foreseeability, developed by Strasbourg judges in relation to ordinary crimes.

In addition, the AC of the ICTY pointed out the necessity of applying the standards of the legality principle to any form of criminal liability.¹⁰⁷ This means that criminal liability must have a legal basis traceable in the Statute and in customary law, but also that the law establishing such responsibility must be accessible at the time at which acts are committed, and the individual must be able to foresee whether he could be held criminally liable for his action.

Beyond the *ad hoc* tribunals, the increasing weight assumed by the legality principle in international criminal law is testified to by the Rome Statute, which is the first statute of an international criminal tribunal explicitly establishing that "a person shall not be criminally responsible under this Statute, unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court".¹⁰⁸ Together with the non-retroactivity principle, which is applied also to acts committed prior to the entry into force of the Rome Statute on 1 July 2002,¹⁰⁹ this instrument provides that the definition of a crime must be strictly construed so that ICC's judges are clearly prevented from analogically applying criminal norms.¹¹⁰ In addition, according to Article 24, in the event of a change of a law applicable to a given case prior to a final judgment, the law which

¹⁰⁵ See *Prosecutor v. Mitar Vasiljević*, 29 November 2002, Trial Chamber, <<http://www.icty.org/x/cases/vasiljevic/tjug/en/vaso21129.pdf>>, last visited 19 May 2012, paras. 199–201.

¹⁰⁶ *Ibid.*

¹⁰⁷ See *Prosecutor v. Milan Milutinovic, Nikola Sainovic, and Dragoljub Ojdanic*, 21 May 2003, Appeals Chamber, para. 21.

¹⁰⁸ See Article 22 of the Rome Statute (Statute).

¹⁰⁹ See Article 24(1) of the Statute: "No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute."

¹¹⁰ See Article 22(2) of the Statute: "The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."

is more lenient to the person being investigated, prosecuted or convicted shall apply.¹¹¹

On the basis of these provisions, the Statute recognises that the most serious crimes of concern for the whole international community cannot be punished irrespective of legal certainty. This is an essential component of the fundamental rights of any person. In this regard, it could be objected that Article 21(1)(c) of the Statute encompasses within the applicable law the “general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime”.¹¹²

However, it is possible to establish a clear distinction between Article 21(1)(c) and Article 7(2) of the European Convention since a contextual interpretation of Article 21(1)(c) in the light of the various corollaries of the legality principles as specified in the Statute excludes that this provision may constitute a derogation from the legality principle as such. Admitting the existence of such derogation would indeed deprive of any meaningful content the strict standards of the legality principle provided by the Statute. Particularly, it would be difficult to argue that ICC judges may deviate from individual guarantees when the Statute explicitly imposes them to strictly define crimes and not to apply analogically criminal norms. Therefore, the sources listed in Article 21 cannot be applied irrespective of the individual guarantees under the legality principle, whose central role is confirmed by the different modalities in which this principle has been articulated,¹¹³ and by the way in which the ICC strives to define as precisely as possible the conduct that may constitute international crimes.¹¹⁴

In regard to the Strasbourg Court, it cannot be excluded that the jurisprudence of the *ad hoc* tribunals, and the ICC’s Statute, in particular, have implicitly influenced the extension of the legality principle over international crimes in both *Korbely* and *Kononov*. Indeed, the various sectors of international law are, at present, closely intertwined, thereby giving rise to a phenomenon that Cassese authoritatively defined “gradual interpenetration and cross-fertilization of previously somewhat compartmentalized areas of international law”.¹¹⁵

¹¹¹) See Article 24(2) of the Statute: “In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.”

¹¹²) See Article 21(1)(c) of the Statute: “The Court shall apply ... general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.”

¹¹³) See Articles 22, 23 and 24 of the Statute.

¹¹⁴) See H. Olasolo, ‘A Note on the Evolution of the Principle of Legality in International Criminal Law’, 18 *Criminal Law Forum* (2007) p. 310.

¹¹⁵) Cassese, *supra* note 25.

Therefore, international criminal law provides an excellent example of how – despite the structural differences between international criminal justice and regional courts for human rights – recently there has been an increase in the mutual interactions between international criminal tribunals and the Strasbourg Court.¹¹⁶

In this context, it seems that the paradigm shift in the European jurisprudence may be situated within a phenomenon of spontaneous and non-hierarchical circulation or cross-fertilisation of different legal regimes.¹¹⁷ By departing from the applicability of the derogation to the non-retroactivity principle, the European Court appears finally to align itself with the particular evolution characterising the legality principle in international criminal justice.¹¹⁸ In conformity with the international criminal tribunals, the Court acknowledges indeed the necessity to limit the intervention of criminal justice to those types of conduct clearly proscribed by law, by accepting that the seriousness of the acts committed by a person does not constitute a valid reason to deviate from fundamental guarantees.

7. The *Banalisation of Sources* in the Strasbourg Jurisprudence: A Criminal Law Perspective

The passage from the second to the first paragraph of Article 7 in the Court's case law entails an enhancement of individual safeguards from the arbitrariness of state power. However, despite that *Korbely* and *Kononov* marked a watershed in the European Court's jurisprudence, it is possible to express some concerns that the meaningful protection of the legality principle is *in concreto* limited. The real *punctum dolens* is constituted by the sources which are, according to the Court, a valid basis for the individuals' conviction pursuant to the standards of the legality principle.

It is important to briefly remark how in criminal law sources assume a central relevance, especially in relation to the legality principle, since their nature and peculiarities have a direct impact on the knowledge that an individual has of a prohibited act.¹¹⁹ The specificity principle, which constitutes one of the main elements of the *nullum crimen sine lege*, requires that criminal rules are as detailed as possible, in order to establish clearly which conduct is prohibited.¹²⁰ In other words, a clear legal text may provide individuals with warning as to what the law prohibits.

¹¹⁶) See *inter alia* Schabas, *supra* note 10.

¹¹⁷) M. Delmas-Marty, 'Du dialogue à la montée en puissance des juges', in *Le dialogue des juges – Mélanges en l'honneur du président Bruno Genevois* (Dalloz, Paris, 2009) p. 306.

¹¹⁸) See Olasolo, *supra* note 114, p. 310.

¹¹⁹) Fiandaca and Musco, *supra* note 6, p. 76.

¹²⁰) Cassese, *supra* note 25, p. 70.

Nonetheless, as testified by a consolidated jurisprudence, the Court does not focus on the formal nature of law, pointing out that criminal offences or penalties may have a legal basis in written or non-written law.¹²¹ With regard to Article 7(1), the Court does not clarify which sources fall within the concept of international law. However, it admits their direct applicability pursuant to the standards of the non-retroactivity principle. It means that the lack of a national law transposing international law into the domestic system – at the time of the commission of the crimes in question – does not assume relevance in light of the requirements of the *nullum crimen*. To put it more clearly, a domestic court can try or punish a behaviour criminalised only by international norms not transposed into domestic law without breaching the legality principle. The Grand Chamber of the Court, for instance, ascertained whether the applicants' conducts, at the time when crimes were committed, constituted an offence defined with sufficient accessibility and foreseeability either by domestic or international law.¹²²

The direct applicability of international law pursuant to Article 7(1) was stated in the *Kononov* case, in which the Court found out that “law for the definition of the offence, the domestic and international provisions form, in practice, a single criminal norm that is attended by the guarantees of Article 7(1) of the Convention”.¹²³ Although the domestic criminal norm was adopted 41 years after the applicant's conduct took place, the Court excluded that criminal law was applied retroactively since international law provided – at the relevant time – a clear legal basis, namely the Hague Conventions 1907.¹²⁴ Therefore, there is no violation of the *nullum crimen* when an individual is convicted by a national court on the basis of international norms not transposed into domestic law.¹²⁵

The issue regarding the direct applicability of international law under Article 7(1) is still subject to debate among scholars. Whilst according to some authors this possibility is considered consistent with the requirements of the *nullum crimen sine lege*,¹²⁶ other commentators believe that Article 7(1) requires the fulfilment of the conditions imposed by domestic justice systems through a transposition of international law into national law.¹²⁷ By contrast, a different perspective affirms that it must be ascertained whether in the specific constitutional system international law has a direct internal effect and whether the individual

¹²¹ See *inter alia* *Cantoni v. France*, 11 November 1996, ECHR no. 17862/91, para. 29, <<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=cantoni&sessionId=98821363&skin=hudoc-en>>, last visited 1 June 2012.

¹²² See *Korbely*, *supra* note 3, para. 73; *Kononov no. 1*, *supra* note 20, para. 116.

¹²³ See *Kononov no. 1*, *supra* note 20, para. 119.

¹²⁴ See *Kononov no. 2*, *supra* note 2, para. 216–219.

¹²⁵ *Ibid.*

¹²⁶ See Velu and Ergec, *supra* note 27, p. 514.

¹²⁷ See Pradel and Corstens, *supra* note 26, p. 320; D. Harris, M. O' Boyle and C. Warbrick, *The Law of the European Convention on Human Rights* (London, 1995) p. 277.

convicted could reasonably foresee his conduct constituted an offence under international law.¹²⁸

Despite that Article 7 seems to admit the direct applicability of international sources, by using the disjunctive formula national *or* international law, it must be considered that in several cases sources of international law are drafted as obligations upon states, not taking into account the standards of the legality principle toward individuals. Thus, it would be required that states reformulate them consistently with their own standards of legality before introducing crime proscriptions in their national justice system.

The Court accepts that sources, not entailing any reference to criminal responsibility or threat of criminal sanction, may fall within the meaning of international law under Article 7. This is true in relation to the famous *Borderguards* judgments, in which European judges held that at the time when the acts were committed they also constituted offences defined with sufficient accessibility and foreseeability by the rules of international law on the protection of human rights.¹²⁹ In so doing, the Strasbourg Court interpreted the concept of international law referring to well-defined sources of international human rights law, in particular with regard to the right to life and the right to movement.¹³⁰

A similar legal reasoning was followed in the *Kononov* case, whereby the Court affirmed that offences at the time of their commission were defined with sufficient accessibility and foreseeability mainly on the basis of a myriad of sources, including the Hague Convention of 1907,¹³¹ domestic laws, national and international jurisprudence, Draft Declarations and military manuals.¹³² Binding and not binding norms, as well as enforced and not enforced law, were thus put together,

¹²⁸) See Van Dijk and Van Hoof, *supra* note 27, p. 486.

¹²⁹) *K.H.W v. Germany*, 22 March 2001, ECHR no. 37201/97, <<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=&sessionid=98838518&skin=hudoc-en>>, last visited 12 April 2012; *Streletz, Kessler, Krenz v. Germany*, 22 March 2001, ECHR 34044/96, 35532/87, & 44801/98, <<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=streletz&sessionid=98838518&skin=hudoc-en>>, last visited 12 April 2012 (*Borderguards* case).

¹³⁰) *Ibid.*, para. 105. For a critical assessment of such judgments, see *inter alia* B. Juratowitch, 'Retroactive Criminal Liability and International Human Rights Law', in 75 *British Year Book of International Law* (2004); P. E. Quint, 'The Border Guard Trials and the East German Past-Seven Arguments', 48:4 *The American Journal of International Law* (2000); J. Arnold, N. Karsten and H. Kreicker, 'The German Border Guard Cases before the European Court of Human Rights', 11:1 *European Journal of crime, criminal law and criminal justice* (2003).

¹³¹) See *Kononov* no. 2, *supra* note 2, paras. 216–219.

¹³²) Beyond the Hague Convention, the Court referred, *inter alia*, to the: Geneva Law (1864–1949), paras. 53–62; Lieber Code (1863), paras. 63–77, 207; Oxford Manual (1880), paras. 80–85; Draft Bruxelles Declaration (1874), paras. 79–80, 207; Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (1919), paras. 92–93; Treaty of Versailles (1919), para. 94; Treaty of Sèvres (1920), para. 95; Draft Convention for the Protection of Civilian Populations Against New Engines of War (1938), para. 96; Convention on the Non-Applicability of Statutory Limitations to War Crimes (1968), paras. 130–132; European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and

encompassing sources preceding 1944 and sources following the material time at which the events took place.¹³³ Nonetheless, the Hague Convention 1907 and the other sources used by the Court aim to regulate the conduct of states and do not entail any direct reference to individual criminal liability.

Including within the scope of Article 7(1) sources that were not drafted with the specific purpose of being applied directly to individuals may have a significant impact on legal certainty. In this regard, it cannot be denied that the *Kononov* case is distinguishable from the *Borderguards* on the basis of the sources applied for the applicant's conviction. Indeed, the Hague Convention 1907 has been also used by the IMT and the *ad hoc* tribunals to support the punishability of some conducts constituting war crimes.¹³⁴

Therefore, the following key question arises: to what extent can an individual effectively predict that his conduct entails criminal consequences on the basis of a law constituting an obligation only for states? In *Kononov*, the Court based the criminal liability of the applicant mainly on the Hague Convention 1907, despite that it had not been ratified by Latvia. The Court indeed concluded that there was no violation of Article 7, notwithstanding that the domestic applicable law did not contain any reference to the international laws and customs of war, which were not formally published in the USSR on the Latvian SSR.¹³⁵ It can be stated that the usage of the sources in question may undermine the promotion of legal certainty sought by the prohibition of retroactivity of criminal law under Article 7. Indeed, by jeopardising the effective knowledge of the criminalised conducts, they render the legality principle less demanding and less protective of the individual.

In this regard, the Court assessed the foreseeability using subjective standards, namely the subjective ability for the applicant to recognise the criminal liability. In this reasoning, the clarity and precision of criminal law do not assume significant relevance for the sake of guaranteeing foreseeability. Rather, the issue whether the applicants knew at the relevant time that they were committing a criminal offence is ascertained from the perspective of the same applicants in the light, for example, of their status as military commanders.¹³⁶

War Crimes (1974), para. 133; Protocol Additional to the Geneva Conventions of 12 August 1949 (1977), paras. 134–142.

¹³³ See E. Fronza and M. Scoletta, 'Corti regionali, crimini internazionali e legalità penale: spunti (e problemi) a partire dal caso *Kononov*', 11 IUS17 (2012).

¹³⁴ See M. Cottier, 'War Crimes', in O. Triffterer (eds), *Commentary on the Rome Statute of the International Criminal Court* (C.H. Beck, Hart, Nomos, 2008) p. 286.

¹³⁵ See *Kononov* no. 2, *supra* note 2, para. 237.

¹³⁶ *Ibid.*, paras. 236–237, 'As to whether the qualification of the impugned acts as war crimes, based as it was on international law exclusively, could be considered to be sufficiently accessible and foreseeable to the applicant in 1944, the Court recalls that it has previously found that the individual criminal responsibility of a private soldier (a border guard) was defined with sufficient accessibility and foreseeability by, *inter alia*, a requirement to comply with international fundamental human rights instruments, which instruments did not, of themselves, give

The specificity principle explains why convictions and punishments relying on imprecise sources – which neither criminalise individual conducts, nor establish criminal sanctions – entail the concrete risk to lower the qualitative elements of the legality principle to a purely formal choice, unable to fulfil individual safeguards and to limit states' sovereignty.

8. Pursuing a Human Rights Friendly Retroactive Interpretation (*In Malam \ Partem*): An Insoluble Oxymoron

The legality principle contributes to the legitimacy of a legal system since it limits the intervention of criminal justice to those conducts clearly proscribed by law in advance. The *nullum crimen sine lege* protects the separation of powers as it provides the direct representatives of citizens with the law-making authority.¹³⁷ Whilst the legislator has to clearly define criminal acts over which courts may exercise their jurisdiction, the role of the judiciary is confined to interpret and apply law. It does not have the power to create law by convicting persons of conducts not penalised by the legislator in advance.

It is also argued that the legality principle plays a fundamental role in relation to the purposes of criminal law.¹³⁸ Indeed, the preventive function of criminal law is constituted by its power to deter individuals from engaging in socially undesirable conducts, by influencing their decision-making. In other words, only a clear legal text indicating which acts are criminalised and what the consequent sanctions are may provide individuals with warning as to what the law prohibits.

Even recognising the existence of a legal basis clearly proscribing the applicants' conduct at the time of their commission, the reasoning provided by the European Court still does not appear persuasive, particularly if assessed through the prism of the purposes of the legality principle. Indeed, the subjective approach used by the Strasbourg judges to examine the foreseeability presents the risk to reach conclusions that would have been unrealistic at the relevant time. This is mainly due to the fact that the Court proposes an interpretation of the relevant applicable law which appears distant from that which should have been adopted by the competent domestic courts at the time of the events.

It is opportune to remind that in *Kononov* the Court confirmed that a successor state may legitimately bring criminal proceedings against individuals who had committed crimes under a former regime, and in this regard apply and interpret the legal provisions in force at the time in which the acts were committed.¹³⁹

rise to individual criminal responsibility and one of which had not been ratified by the relevant State at the material time."

¹³⁷⁾ See B. Broomhall, 'Nullum Crimen Sine Lege', in Triffterer, *supra* note 134, p. 716.

¹³⁸⁾ *Ibid.*

¹³⁹⁾ See *Kononov no. 2*, *supra* note 2, para. 241.

However, it postulated that this interpretation must be provided “in the light of the principles governing a State subject to the rule of law and having regard to the core principles on which the Convention system is built”.¹⁴⁰

Such an interpretation is proposed by the Court with regard to countries which before changing profoundly their political regime and legal system were not bound by the entire body of international human rights law, and in particular the European Convention. By interpreting the law applicable at the time of the events consistently with a normatively desirable human rights regime created *ex post facto*, the Court seems to provide an ideal interpretation of past law which radically diverged from the interpretation of the law in place in the legal system at the material time. Therefore, every time the Court recasts the past law applicable in a country which has then undergone a complete change in the political regime and legal system, it appears to “disregard the understanding of the legal system as it then existed, and constitutes a kind of fiction adopted in order to avoid the problems of retroactivity”.¹⁴¹

As a result, the Court did not take into account the whole body of relevant applicable law, including the existence of a defence to criminal responsibility, which would have occurred at the material time. Likewise, in the *Borderguards*, the Court upheld the inapplicability of the statutory defence – which specifically authorised state officials to use force in guarding the borders.¹⁴² This led to the strongly criticised conclusion that those ones responsible for running the country and surveillance of the borders committed criminal offences, even if they were acting consistently with statutory defences or state practice.¹⁴³

It is worth to remind that according to Article 7(1), “[n]o one shall be *guilty of any criminal offence* on account of any act or omission which did not constitute a *criminal offence* under national or *international law* at the time when it was committed”.¹⁴⁴ The concept of criminal offence does not merely require that an act or omission fulfils the elements of a crime, but it also necessitates that the act or omission gives rise to criminal responsibility at the time of commission.¹⁴⁵ This is possible only in case of absence of a valid defence.

It can be therefore stated that pursuant to Article 7(1) a proper fulfilment of the standards of the legality principle requires assessing also whether criminal

¹⁴⁰ *Ibid.*, paras. 54–56.

¹⁴¹ See Quint, *supra* note 130, p. 557.

¹⁴² See *Borderguards* case, *supra* note 129, para. 105. In particular, with regard to the grounds of justification pleaded by the applicant, the Court found that “the interpretation and application of domestic law are primarily matters to be assessed by the domestic courts ... It is sufficient for the Court to satisfy itself that the result reached by the German courts was compatible with the Convention, and specifically with Article 7 § 1.” (para. 61).

¹⁴³ Juratowitch, *supra* note 130, p. 349.

¹⁴⁴ Emphasis added.

¹⁴⁵ A. P. Simister and G. R. Sullivan, *Criminal Law Theory and Doctrine* (Hart Publishing, Oxford, Portland, 2007) p. 19.

liability would have been imposed at the time in which events occurred. In particular, this ascertainment gains significant relevance in all those cases regarding crimes committed in a country in which there has been a complete change in the political regime and legal system, such as the former Soviet Union's member states.

In *Kononov*, the Court confirmed that its role is not to “rule on the applicant's individual criminal responsibility, but to ascertain whether at the relevant time (i) there was a sufficiently clear legal basis and (ii) whether those offences were defined with sufficient accessibility and foreseeability ...”.¹⁴⁶ The crucial question is how realistic can be conclusions that the applicants were aware their acts constituted crimes at the time of their commission, without taking into account whether the same conduct actions were covered by existing defences (such as the legitimate use of fire arms) pursuant to the applicable law in their domestic justice system at the relevant time.

Even recognising the limited role of the European Court, it is important that such assessment is performed relying as realistically as possible on the content of the legal rule binding the individual at the material time, including the existence of statutory defences. This means that it could be necessary for the Court to “delve into the interpretation of national law to a greater extent than usual”.¹⁴⁷ Moreover, a purposive interpretation of Article 7(1) requiring that individuals behave consistently with the applicable law at the material time entails the need to verify whether criminal liability would have been imposed as a consequence of their individual conducts.

8. Concluding Remarks

This study assessed the evolution of the recent jurisprudence of the Strasbourg Court, which for the first time, in 2008, extended the standards of the legality principle over international crimes. Departing from the application of the Nuremberg clause, in *Kononov* and *Korbely*, the European judges attempted to restore a balance between individual guarantees and core crimes, by assessing whether a clear legal basis for the applicants' convictions existed at the relevant time.

However, although the passage from the second to the first paragraph of Article 7 in the Court's jurisprudence entails *in abstracto* a strengthening of individual safeguards from the arbitrariness of state power, it can be argued that the meaningful protection of the legality principle may be *in concreto* significantly narrow. The reasons for such a result are two-pronged: first, the Court seems to provide an interpretation of past law which radically diverged from the interpretation of the

¹⁴⁶) See *Kononov* no. 2, *supra* note 2, para. 187.

¹⁴⁷) See Juratowitch, *supra* note 130.

law in place in the legal system at the material time of the events; second, the international sources accepted by the Court as a valid basis for the applicants' convictions – pursuant to the standards of the legality principle – were intended to create obligations only upon states, rather than individuals.

With regard to the first issue, it is important to review the criteria used by the Court for determining foreseeability. The concept of criminal offence does not merely require the satisfaction of the elements of a crime, but it also necessitates that the accused's conduct could engage criminal responsibility at the time of commission. In addition, the assessment of foreseeability should be performed by relying, as realistically as possible, also on the existence of statutory defences.

With regard to the second issue outlined above, it is true that the legality principle in international criminal law is more tolerant of imprecision than national law. Its standards and application differ from those recognised in domestic justice systems, especially considering that in international law a myriad of sources, including treaties, declarations, jurisprudence and other patterns of State practice and *opinion juris*, may contribute to the definition of crimes.

Nonetheless, the trend in international criminal justice shows that statutory criminal norms, in the attempt to define as precisely as possible the proscribed conducts, are assuming increasing relevance. This is confirmed by the Rome Statute, which reduces the gap existing between international criminal law and many national criminal systems in relation to the requirements of the legality principle. This instrument strives indeed to define as precisely as possible the conducts that may constitute international crimes, as shown by a number of substantive penal norms provided by Articles 6–8. In addition, the Elements of the Crimes,¹⁴⁸ describing the crimes falling within the competence of the ICC in a detailed fashion, contribute to the strengthening of legal certainty.

In this respect, on the basis of the phenomenon of circulation or cross-fertilisation of different legal regimes, providing that international criminal law and human rights law should be coherently interpreted as parts of a whole, it is expected that the Rome Statute can constitute a crucial benchmark for a further evolution in the European Court's jurisprudence.

¹⁴⁸) See Article 9 of the Statute: "Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties."